In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-307

ROBERT EDWIN BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REFERENCES

"Amicus Brief". . . This refers to the Motion of the United States for Leave to File Brief Amicus Curiae and Brief for the United States as Amicus Curiae filed August 5, 1978.

"App.". . . This refers to the Appendix hereto.

"CT". . . This refers to the transcript of the continued proceedings certified to the United States Court of Appeals for the Ninth Circuit by the Clerk of the United States District Court for the District of Arizona on May 3, 1977.

"RA". . . This refers to the record on appeal certified to the United States Court of Appeals for the Ninth Circuit by the Clerk of the United States District Court for the District of Arizona on May 3, 1977.

"RT". . . This refers to the trial transcripts certified to the United States Court of Appeals for the Ninth Circuit by the Clerk of the United States District Court for the District of Arizona on May 3, 1977.

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Petitioner Robert Edwin Brown respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 1, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, not yet reported, appears as Appendix IV hereto. The United States District Court for the District of Arizona did not render an opinion.

JURISDICTION

The judgment of the Ninth Circuit was entered on June 1, 1978 [App. III], affirming Petitioner's judgment of conviction entered on March 15, 1977 [App. II]. A timely petition for rehearing with suggestion for rehearing *en banc* was denied by the Ninth Circuit on July 24, 1978 [App. VII], and this petition for certiorari was filed within thirty days thereof. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

1. Whether judicial determinations bringing land sale contracts within the purview of the Securities Act of 1933 can be applied retroactively, consonant with the fifth amendment's due process requirement, to sustain a conviction for "willfully" violating the criminal component of that Act.

2. Whether the Ninth Circuit's construction of the willfullness requirement of 15 U.S.C. § 77x (1970) (amended 1975), which creates a conflict in principle among circuits, misconstrues the standard of intent required for conviction under that provision.

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 77q(a) (1976):

Fraudulent interstate transactions; Use of interstate commerce for purpose of fraud or deceit

It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77x (1970) (amended 1975):

Penalties

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. V:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Petitioner was indicted and convicted for willfully violating the Securities Act of 1933 ("the Act"), 15 U.S.C. § 77q(a) (1976) and § 77x (1970) (amended 1975). Five concurrent five-year prison terms and seven fines in the aggregate amount of $35,000 were imposed. [App. II]

Of the thirty-four counts for which he was indicted, including one count of conspiracy, two counts of mail fraud, six counts of the sale and delivery of unregistered securities and twenty-four counts of fraud in the sale of securities [App. I],* Petitioner was convicted only of the single conspiracy count and ten counts of securities fraud [App. II]. The remaining counts were either dismissed or Petitioner was acquitted. [RA 143, 149]

Petitioner's convictions arose from the sale of land sale contracts to investors, all of which contracts were assigned to investors during the period June through September, 1971. [RA 100-01 and exhibits submitted therewith] During that relevant period, Petitioner was president of Arizona-Florida Development Company ("AFD"), a corporation engaged in selling subdivided real estate located in Arizona and Florida. AFD sold the subdivided lots on an installment contract basis, subsequently factoring the contracts at eighty percent of face value to Summit Investment Company ("Summit"), an unaffiliated Florida brokerage firm, which in turn assigned the rights to payment under the contracts to individual investors.

In October, 1971, after the last land sale contract at issue in Petitioner's trial had been assigned to an investor, the Securities and Exchange Commission ("SEC") issued a cease and desist order to Summit [RT 351]; the SEC's private investigation did not include AFD until March 7, 1972 [RA 109]. Significantly, it was not until after the land sale contracts had been assigned that an authoritative judicial determination concluded that such contracts were subject to the Act.** Moreover, Petitioner had been informed by his attorney prior to the issuance of a cease and desist order to Summit that the SEC had approved AFD's sale of installment contracts. [CT 7-8]

*Count 1 outlined the factual framework upon which the subsequent counts were based. [App. I]

**SEC v. Lake Havasu Estates, 340 F. Supp. 1318 (D. Minn. 1972), was the first case to hold that land sale contracts were "securities." After having considered "several factors not heretofore discussed in resolving the 'security' issue," the court preliminarily enjoined the unregistered sale of land purchase contracts because they constituted investment contracts and hence securities within the meaning of the Act. *Id.* at 1321-22. Moreover, even Professor Loss doubted the applicability of the Act to land sale contracts. I L. Loss, *Securities Regulation* 493 (2d ed. Supp. 1969).

Over two years elapsed from the SEC's initial investigation of AFD before the agency referred the matter to the Department of Justice for criminal proceedings. [CT 30] In June, 1975, a federal grand jury issued a subpoena to Petitioner for his records [RA 123]; he was subsequently indicted on July 7, 1976, more than fifty-seven months after the initiation of the SEC's investigation [App.I].* Although requested by Petitioner to take evidence and make findings of fact as to whether he had knowledge that the land sale contracts constituted securities, the trial judge refused, holding that knowledge that an instrument constitutes a security is not a prerequisite to finding a willful violation of the Act. [RT 1064]

Following his convictions, Petitioner filed a timely notice of appeal [RA 188], and oral argument was heard on December 16, 1977 by Judges Wright, Hug and Ingram. Subsequently, on June 1, 1978, that panel rendered an opinion affirming the convictions and the district court's conclusion that knowledge that an instrument is a security

*During the last few months of that 57-month interim, two witnesses died, including Petitioner's attorney [CT 10], who would have corroborated Petitioner's lack of knowledge that the land sale contracts constituted securities. The second deceased witness, Betty Anderson, an AFD employee, was intimately familiar with the procedures of the office with respect to the sale of realty and the subsequent sale and assignment of the land sale contracts. [RT 567]

is not a prerequisite to conviction for a willful violation of the Act and ordered that mandate revoking bail be issued forthwith. [App. IV at 34a, 41a]

Contemporaneously with his timely petition for rehearing, Petitioner sought a recall of the panel's mandate. That request was denied on June 16, 1978 [App. V], whereupon Petitioner sought a stay from Mr. Justice Rehnquist, which petition was also denied [App. VI]. On July 24, 1978, the petition for rehearing was denied. [App. VII]

At present, Petitioner is incarcerated in a federal correctional facility.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE NINTH CIRCUIT DENIES PETITIONER'S DUE PROCESS RIGHTS AND, IN SO DOING, CONFLICTS WITH A RECENT DECISION OF THIS COURT WHICH PROHIBITS GIVING RETROACTIVE APPLICATION TO A NEW JUDICIAL DEFINITION EXPANDING THE SCOPE OF A FEDERAL CRIMINAL STATUTE; MOREOVER, THE CASE POSES AN IMPORTANT ISSUE OF FEDERAL LAW WHICH IS CLOSELY RELATED TO A QUESTION NOW PENDING BEFORE THIS COURT.

By concluding that the Government is not required to prove as a prerequisite to a conviction under the Act that an object sold or offered could reasonably have been known by a defendant to be a security [App. IV at 34a], the Ninth Circuit's opinion directly conflicts with prior decisions of the Court disallowing the retroactive application of judicial decisions in a criminal proceeding. In *Marks v. United States*, 430 U.S. 188 (1977), defendants had been convicted under 18 U.S.C. § 1465 (1976) for "knowingly transport-[ing] . . . obscene . . . matter" where the trial court had applied the standard enunciated in *Miller v. California*, 413

U.S. 15 (1973), notwithstanding that *Miller* had been decided after the allegedly illegal conduct. In reversing the court of appeals' affirmance, the Court held that the conviction violated defendants' fifth amendment rights by not giving them fair warning that their conduct was subject to sanction. Because *Miller* had expanded the breadth of the sweeping term, "obscene matter," the Court held, based on the reasoning of *Bouie v. City of Columbia*, 378 U.S. 347 (1964), that retroactive application of the expansive interpretation deprived the defendants of due process by failing to afford them fair warning that their conduct was subject to sanction.

Petitioner similarly was denied fair warning that his conduct was unlawful. During the period in which he assigned the contracts for which sales he was ultimately convicted, not only Petitioner had no fair notice that land sale contracts were securities, but no person of ordinary intelligence was so apprised. [See pp. 4-5 *supra*] It was only by retroactively applying later-established judicial determinations that land sale contracts constituted securities* that the Ninth Circuit could affirm his convictions. In view of *Marks*, that retroactive application clearly violated Petitioner's due process rights.**

Petitioner's contention that he has been denied due process of law by retroactive application of judicial determinations brings into issue not only the effect of a due process denial as applied to him, but raises a question having far-reaching ramifications that is companion to an issue in a case now pending before the Court, *International Brotherhood of*

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*There is no dispute now that the contracts are subject to the Act.

**Although Petitioner did not explicitly present a fifth amendment argument to the Ninth Circuit, the argument's underlying principle—lack of notice and, accordingly, lack of due process—was squarely presented to the court. Moreover, in view of the importance of the issue to notions of fundamental justice, review by the Court is appropriate. *E.g.*, Hormel v. Helvering, 312 U.S. 552, 557 (1941).

Teamsters v. Daniel, 561 F.2d 1223 (7th Cir. 1977), *cert. granted,* 46 U.S.L.W. 3526 (U.S. Feb. 21, 1978) (Nos. 77-753 and 77-754). While the questions for review in *Daniel* pertain to whether non-contributory employee pension plans constitute "securities" and whether there is a "sale" of those plans to the employees in exchange for their labor, the United States by the Solicitor General, as *amicus curiae,* has raised a question similar to that posed by Petitioner: In the event the Court determines that non-contributory pension plans constitute securities, should that determination be given retroactive application, permitting claims for fraud arising from pre-decision conduct to be brought under the federal securities acts, including, *inter alia,* 15 U.S.C. §77q(a) (1976), a provision under which Petitioner was convicted? [Amicus Brief at 10, 50]

Relying upon *City of Los Angeles v. Manhart,* 98 S. Ct. 1370 (1978), the Government argues that in view of the congressional history of the securities acts and acts regulating employee retirement plans, the Court should not impose retroactive liability. While the Government's argument is based upon legislative intent and the " 'devastating' liability which would be borne 'in large part [by] innocent third parties' " [Amicus Brief at 50, *quoting City of Los Angeles v. Manhart,* 98 S. Ct. at 1382-83], its premise is similar to that posed by Petitioner: Retroactive liability resulting in a "marked departure from past practice" impermissibly punishes a defendant [*id.*]. In the context of *Daniel,* that liability is monetary, but if the Court determines that non-contributory pension plans constitute securities, there is implicit in that determination the question of retroactive criminal liability. Petitioner's case clearly poses that issue and presents for the Court's consideration the twin questions: (1) Whether criminal liability may be

imposed on an *ad hoc* retroactive basis consistent with the fifth amendment, and (2) must liability be limited to persons who have had the opportunity to be apprised that their conduct is subject to sanction?

II

BY ALLOWING A CONVICTION FOR WILLFUL VIOLATION OF A FEDERAL REGULATORY STATUTE TO STAND ABSENT PROOF THAT PETITIONER KNEW OR SHOULD HAVE KNOWN THAT LAND SALE CONTRACTS CONSTITUTED A REGULATED ITEM WITHIN THE STATUTE, THE DECISION OF THE NINTH CIRCUIT CREATES A CONFLICT IN PRINCIPLE AMONG THE CIRCUITS, WHICH THIS COURT SHOULD RESOLVE, AS TO THE REQUISITE INTENT NECESSARY FOR WILLFUL VIOLATION OF A FEDERAL CRIMINAL STATUTE.

The decision below should be reviewed because it erroneously interprets the Act so as to disrupt the orderly administration of criminal justice in the federal courts. The decision below conflicts in principle with the decisions of the Fourth Circuit in *United States v. Critzer,* 498 F.2d 1160 (4th Cir. 1974) (Winter, J.), and of the Ninth Circuit in *United States v. Lizarraga-Lizarraga,* 541 F.2d 826 (9th Cir. 1976), and it conflicts with traditional notions of criminal jurisprudence concerning an issue of first impression under the Act that the Court should resolve.

Section 77x of Title 15 of the United States Code (1970) (amended 1975) provides for criminal sanctions with respect to any person who "*willfully* violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof . . . ." [Emphasis supplied] In the courts below, Petitioner asserted that there could be no conviction for "willful" violation of the Act's prohibition of fraud in the sale of a security, with the resultant imposition of criminal

sanctions, unless the Government proved that Petitioner knew or reasonably should have known that the instrument which he assigned was a "security" within the meaning of the Act. Accordingly, the trial court erred as a matter of law in entering judgments of conviction by not requiring proof of specific intent to sell a security or proof of specific knowledge, actual or imputed, that the instruments sold by him were securities. The Government's contention, and that adopted by the courts below, was that the existence of a security is a "jural fact" as to which a defendant's specific knowledge is immaterial. [App. IV at 35a]

Believed to be a question of first impression for the Court, Petitioner's contention that 15 U.S.C. § 77x (1970) (amended 1975) requires specific knowledge of the presence of a security to sustain a conviction raises an issue fundamental to the fair administration of criminal justice. Moreover, the opinion of the Ninth Circuit directly conflicts in principle with *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974) (Winter, J.) (construing the meaning of "willfully" in a penalty provision of the Internal Revenue Code, I.R.C. § 7201•). The Fourth Circuit held that a defendant could not be convicted for willfully failing to report income where she was unaware that an item was taxable income within the purview of the Internal Revenue Code, notwithstanding her intentional failure to report that item. In reversing the defendant's conviction for willful evasion of income taxes that imposed a fine and a suspended sentence,

•I.R.C. § 7201 provides as follows:

Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

the court held that the requisite intent, "willfullness," was lacking as a matter of law because "[i]t is settled that when the law is vague or highly debatable," in the sense that it is unclear at the time of a person's act whether a particular item is subject thereto, "a defendant . . . lacks the requisite intent to violate it." 498 F.2d at 1162.

Similarly, in *United States v. Lizarraga-Lizarraga*, 541 F.2d 826, 828-29 (9th Cir. 1976) the Ninth Circuit squarely held that the word "willful," as employed in the Mutual Security Act of 1954, 22 U.S.C. § 1934 (1970) (repealed 1976), requires specific knowledge by a defendant that an article is a regulated item, "ammunition," as defined in that Act. The court held that the Government *had to prove* that the defendant had specific knowledge that the object dealt with was a regulated article. It is submitted that *Lizarraga-Lizarraga* and Petitioner's case are indistinguishable because: In both the relevant statutes are regulatory• and remedial;•• neither statute clearly put the defendant on notice as to its applicability;••• and the trial courts incor-

•The Mutual Security Act of 1954 required registration of persons engaging in certain businesses with respect to arms, ammunition or implements of war. 22 U.S.C. § 1934 (1970) (repealed 1976). The Securities Act of 1933 requires registration of certain securities with respect to their sale. 15 U.S.C. § 77e (1976). The striking similarity of the two statutory schemes is further underscored by the fact that courts afford great deference to the rules and regulations of the respective administrative agencies and, in particular, to the definitions of the regulated objects promulgated by those agencies.

••*Compare* 22 U.S.C. § 1934(a) (1970) (repealed 1976) *with* S. Rep. No. 47, 23d Cong., 1st Sess. 1 (1933), *reprinted in* I L. Loss, *Securities Regulation* 178 (2d ed. Supp. 1969).

•••Under the Mutual Security Act of 1954, "items might be exported or imported innocently." United States v. Lizarraga-Lizarraga, 541 F.2d at 828. As to the Securities Act of 1933, even the most sophisticated securities lawyers doubted its applicability in 1971 to land sale contracts. *E.g.*, I L. Loss, *Securities Regulation* 493 (2d ed. Supp. 1969).

rectly held that the Government need not prove the defendants had specific knowledge that the objects dealt with were regulated articles.

Without imposing upon the Government the burden of proving specific knowledge, untold numbers of unsuspecting persons are subject to imprisonment for engaging in conduct for or against which they will have been unable to anticipate or to restrict their liability.* In view of the ever-broadening definition of "security" and the manifold legal problems emerging from the expanding function of modern government, unless the *Critzer* view is embraced by the Court, the class of the unwary shall continue to grow and shall be increasingly subject to the imposition of criminal sanctions for which they will have had inadequate notice.

**Cf.* United States v. United States Gypsum Co., 98 S. Ct. 2864, 2872-73 (1978) (holding with respect to the Sherman Act, 15 U.S.C. § 1 (1976), that "a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices," because "'[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence,'" *quoting* Dennis v. United States, 341 U.S. 494, 500 (1951)).

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: August 23, 1978.

Appendices follow

APPENDIX I

Indictment

[Filed July 7, 1976]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR 76-356 TUC

UNITED STATES OF AMERICA,
Plaintiff,

v.

ROBERT EDWIN BROWN,
LAWRENCE I. HOLLANDER, and
RICHARD LAPENTA,
Defendants.

THE GRAND JURY CHARGES:

COUNT 1

1. That beginning on or about November, 1970, and continuing until July 7, 1976, Robert Edwin Brown, Lawrence I. Hollander, and Richard LaPenta devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from the following persons: John Faircloth, Robert Prentice, Jackie Moncovich, Margaret Trent, Betty Bailey, Mary Kohlhepp, Claude Ewing, Monty Cann, Woodrow Copeland, Arthur Bosley, Viola Osburne, Irving Mock, and Lane Hartwell.

2. Beginning on or about November, 1970, and continuing until about July 7, 1976, the defendants and all of them, in the offer and sale of securities and delivery after sale, to-wit: investment contracts in the nature of contract assignments to the persons named in paragraph 1 above, and to others, made use of means and instruments of transportation and communication in interstate commerce and of

the mails, knowingly, wilfully, and unlawfully, directly and indirectly, would and did employ a device, scheme and artifice to defraud and would and did obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and would and did engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon the purchasers of such securities.

3. It was a part of the scheme and artifice, so devised and intended to be devised, that:

a. The defendants did act through the following corporate identities, Buckeye Mines, Inc., Arizona-Florida Equities, Inc., Arizona-Florida Development Corporation, Corona de Tucson, Inc., and 2609 Corporation.

b. The corporations listed in paragraph 3(a) did obtain limited ownership interests in developments known as St. John's River Estates, Volusia County, Florida, Key Cedar Heights, Florida, Ridge Manor Estates, Florida, Lake Mead Rancheros, Mojave County, Arizona, and New Tucson, Pima County, Arizona, at the instigation and through the efforts of the defendants.

c. The defendants, through the corporations in paragraph 3(a) did operate land development and sales businesses with offices in Miami, Florida, Kingman, Arizona, and Tucson, Arizona, whereby the developments listed in paragraph 3(b) were subdivided and sold at various places in the United States to members of the public. Lot sales in the above-mentioned developments were made upon, among others the following representations:

(1) The lot purchase contracts were subject to the purchaser's right to rescind the time payment real estate purchase agreement after visiting the lot purchased;

(2) The lot purchase contracts were subject to the purchaser's rights to receive a full refund of all monies paid upon rescinding the real estate purchase agreement.

d. The defendants caused the corporations to transfer their ownership interests into a trust company in Arizona, as trustee, which had the power to release from the trust and convey portions of the trust estate for which full payment had been received.

e. From November, 1970, and thereafter, the defendants caused to be generated time payment lot purchase contracts evidencing the sale of lots in the developments listed in 3(b).

f. The defendants did solicit and induce members of the public ("victim-assignees") from throughout the United States to invest money and property of value in securities, namely, assignments of the time payment lot purchase contracts ("contract assignments"), utilizing the efforts of Summitt Investments, Inc., SEI, Inc., East-West Financial, AFCO, Inc., and other factoring agencies and their salesmen.

g. The defendants would and did cause to be sold, assigned and delivered after sale and assignment to the person [*sic*] heretofore described as victim-assignees for cash or property of value, such contract assignments. Such contract assignments provided for payments to the victim-assignees in monthly installments over a period of months.

h. On or about January, February and March of 1971, for the purpose of creating lot purchase contracts for sale and for the purpose of demonstrating apparent business activity, the defendants forged and caused to be forged certain lot purchase contracts in St. John's River Estates.

i. On or about April and May of 1971 for the purpose of creating lot purchase contracts for sale and for the

purpose of demonstrating apparent business activity, the defendants executed and caused to be executed in the name of employees, salesmen and relatives, purported time payment lot purchase contracts for which the defendants knew no payments would be made.

j. The defendants would and did sell contract assignments to victim-assignees notwithstanding the fact that at the time the contract assignments were executed, the contingent lot-purchase contracts assigned were rescinded, delinquent in payment, in jeopardy, in default, subject to cancellation, cancelled, forged, counterfeit, previously assigned to others, or otherwise of questionable value.

k. The defendants would and did create and allow the creation of a pool of the proceeds arising from the contract assignments for the use of the developments specified in paragraph 3(b), the defendants, and others. This pool of proceeds was also comprised of funds raised from the sale of corporate notes and mortgages referred to later in this indictment. A total of in excess of eight million dollars went into this pool, which amount was raised from the sale of about ten million dollars in these securities.

l. The defendants, directly and indirectly, disbursed monthly interest and principal payments for a time to the victim-assignees in the name of the purported lot purchasers from the pool of proceeds created in apparent compliance with the provisions of the contract assignments, the defendants intending thereby to lull the victim-assignees into a false sense of security with respect to the safety of their investment, to induce the investors to invest more money in said contract assignments and related securities offered by the defendants and to prevent victim-assignees from becoming aware of the scheme and artifice to defraud.

m. That on or about August 1, 1971, and thereafter, the defendants did solicit and induce members of the public (victim-investors) to invest money or property of value with the defendants through the corporations in paragraph 3(a) by purchasing from the corporations securities as defined in the Securities Act of 1933, as amended, 15 U.S.C. § 77(b)(1), namely corporate promissory notes of the corporations specified in 3(a), purportedly secured by first realty mortgages on lots in the developments specified in 3(b), by means of false and fraudulent pretenses, representations, and promises, the defendants well knowing at the time that the pretenses, representations and promises would be and were false and fraudulent when made.

n. The defendants would and did make use of the means and instruments of transportation and communication in interstate commerce and of the mails to sell such contract assignments and corporate notes, which were and are securities as defined by the Securities Act of 1933, as amended, 15 U.S.C. § 77b(1), no registration statement being in effect with respect to them as required by said Act, 15 U.S.C. § 77e(a).

4. It was further a part of the scheme and artifice to defraud that by means of oral and written representations, for the purpose of inducing the victim-assignees to part with their money, and for the further purposes of lulling the victim-assignees into a false sense of security, of avoiding discovery, and of convincing the victim-assignees that they had no recourse against the defendants, said defendants, and all of them, did make and cause to be made, the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises were false and fraudulent when made:

a. That the victim-assignees were secure in their investments because the contract assignments which they bought were secured by property more valuable than the face amount of the contract;

b. That there was little or no risk involved in an investment in the contract assignments, but rather, such an investment was safe and secure;

c. That in purchasing the contract assignments the victim-assignees owned the underlying lot subject only to the lot-purchase contract and, in the event of default, could take possession of the property;

d. That the corporations set out in 3(a) were in sound financial condition;

e. That the property involved was free of all liens and incumbrances, and that the defendants or the corporations in paragraph 3(a) had ownership rights in the property.

f. That the contracts when assigned were genuine, valid, enforceable contracts for the sale of the property described.

5. It was further a part of the scheme and artifice, that the defendants and all of them, would and did withhold and conceal from various victim-assignees the following material facts, the disclosure of which was necessary in order that statements and representations made and caused to be made by the defendants relative to the sale of the securities would not be misleading, false and fraudulent;

a. The lots sold pursuant to the lot-purchase contracts were covered by a first and a second mortgage;

b. That lots sold in St. John's River Estates were sold in violation of the Interstate Land Sales Act, Title 15, United States Code, Section 1701;

c. The contracts assigned were subject to a money-back guarantee which provided that the lot purchaser could,

after personally inspecting the lot, receive a refund of all monies paid on the contract;

d. That the lot purchase contracts were forged, rescinded, cancelled, void, voidable, counterfeit, invalid and unenforceable, and were created to transfer land not owned by the defendants or their corporations set out in paragraph 3(a), and that these contracts were otherwise of questionable value at the time they were assigned;

e. That the defendants were making monthly principal and interest payments to the victim-assignees, not by remitting the payments directly from lot purchasers, but out of the proceeds of selling and assigning the lot purchase contracts;

f. That such monthly payments were made to investors merely to lull them into a false sense of security and to prevent them from looking to the defendants for refund of their investments;

g. That victim-assignees, in the absence of success in the defendants' land development businesses, would receive monthly interest and principal payments only for a time, and ultimately, the lot-purchase contracts would not be paid or replaced;

h. The value of the property supposedly securing the contract assignments was far less than the amount invested;

i. Investment in the contract assignments was an extremely speculative, high risk venture;

j. The victim-assignees could not take possession of the underlying lot in the event of default by the lot purchaser, and in the case of St. John's River Estates, the land was not owned by the defendants or any of the corporations in paragraph 3(a);

k. That the contract assignments were being sold in violation of federal securities laws.

6. It was further a part of the scheme and artifice to defraud that by means of oral and written representations, for the purpose of inducing the victim-investors to part with their money, and for the further purposes of lulling the investors into a false sense of security, of avoiding discovery and of convincing the investors that they had no recourse against the defendants, said defendants, and all of them, did make and cause to be made the following false and fraudulent pretenses, representations and promises, well knowing at the time the pretenses, representations, and promises were false and fraudulent when made:

a. That in purchasing the corporate notes, the investors became first lienholders and could take possession of the subject property in the event of default;

b. That the victim-investors were secure in their investments because the corporate notes which they bought were secured by property more valuable than the face amount of the notes;

c. There was little or no risk involved in an investment in the corporate notes, but rather, such an investment was safe and secure;

d. That Buckeye Mines, Inc., the holding company for the corporations of 3(a) had assets of five to six million dollars.

7. It was further a part of the scheme and artifice, that the defendants, and all of them, would and did withhold and conceal from the victim-investors the following material facts, the disclosure of which was necessary in order that statements and representations made and caused to be made by the defendants relative to sale of the securities would not be misleading, false and fraudulent:

a. At the time the aforementioned securities were sold, the property involved in the transactions was incumbered by prior liens, which would be released only upon payment of a portion of the investor's funds to the prior lien holder;

b. Investment in the securities of the defendants' corporations (paragraph 3a) was an extremely speculative, high risk venture;

c. The corporations of paragraph 3(a) were incurring debt at a rate substantially exceeding their ability to pay off accumulating obligations;

d. That the corporations in paragraph 3(a) were not safeguarding the victim-investors' interests;

e. That the corporations of paragraph 3(a) were making monthly interest payments to victim-investors, not out of income generated by operations of their land development businesses, but out of proceeds accruing from the sale of corporate notes secured by realty mortgages and contract assignments;

f. That such monthly payments were made to investors to lull them into a false sense of security and to prevent them from looking to the defendants for refund of their investments;

g. That in the absence of the success of the defendants' land development business, victim-investors would receive monthly interest payments only as long as corporate note sales continued at an increasingly high rate;

h. That the corporate notes and mortgages were being sold in violation of federal securities laws.

8. It was further a part of the scheme and artifice that the defendants would and did make use of the United States mails in furtherance thereof, to send and receive correspondence, lot-purchase contracts, assignments, cor-

porate notes, promotional materials and monthly payments to and from the victim-assignees, victim-investors and others for the purpose of lulling them into a false sense of security and allaying any possible fear or suspicion, in order that the defendants could continue to seek and secure money from other individuals who could be persuaded to invest in contract assignments and corporate notes.

9. On or about July 28, 1971, in the District of Arizona, and the Southern District of Florida, for the purpose of executing the pattern of conduct set out in paragraphs 1 through 8, the defendants Robert Edwin Brown, Lawrence Hollander and Richard LaPenta, in the offer and sale of a security, an investment contract in Lake Mead Rancheros, to Jackie Moncovich, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail, and did transport in interstate commerce by making use of a means of interstate commerce, from Miami, Florida, to Kingman, Arizona, a new contract transmittal sheet, on Lot 2601, Unit 11, Lake Mead Rancheros, in the name of Gerald Thompson, buyer, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 2

On or about August 15, 1971, in the Southern District of Florida, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, Robert Edwin Brown, in the offer and sale of a security to Jackie Moncovich, knowingly, wilfully, and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce, from Miami, Florida, to Chesapeake, Virginia, a check in the amount of $525.05 to Jackie Moncovich, 1010 Poindexter Street, Chesapeake, Virginia, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 3

That on or about July 28, 1971, in the District of Arizona and the Southern District of Florida, for the purpose of executing the pattern of conduct set out in Count 1, the defendants Robert Edwin Brown, Lawrence Hollander and Richard LaPenta, in the offer and sale of a security to Margaret L. Trent, knowingly, wilfully and unlawfully directly and indirectly, did cause to be sent by mail, and did transport in interstate commerce by making use of a means of interstate commerce, from Miami, Florida, to Kingman, Arizona, a new contract transmittal sheet on Lot 2340, Unit 10, Lake Mead Rancheros, in the name of Tristan Joya, buyer, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 4

On or about August 15, 1971, in the Southern District of Florida, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, Robert Edwin Brown, in the offer and sale of a security to Margaret L. Trent, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce, from Miami, Florida, to Waterloo, Iowa, a check in the amount of $293.47 to Margaret L. Trent, 4185 W. 4th Street, Waterloo, Iowa, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 5

On or about September 1, 1971, in the District of Arizona, Robert Edwin Brown, Lawrence Hollander and Richard LaPenta, for the purpose of executing the scheme and artifice of Count 1, and attempting to do so, did cause to be placed in an authorized depository for mail matter, and knowingly caused to be delivered by mail, a lot purchase agreement on Lot 205, Unit 20, Lake Mead Rancheros, in the name of Harvey Greenberg, addressed to Transamerica Title Insurance Company, Kingman, Arizona, according to the direction therein, to be sent and delivered by the Postal Service, all in violation of Title 18, United States Code, Section 1341.

COUNT 6

On or about September 10, 1971, in the District of Arizona, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, Robert Edwin Brown, in the offer and sale of a security to Betty B. Bailey, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce, from Miami, Florida, to Kingman, Arizona, a lot purchase agreement on Lot 205, Unit 20, Lake Mead Rancheros, in the name of Harvey Greenberg, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 7

On or about May 1, 1972, in the Southern District of Florida, and the Western District of Virginia, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, Robert Edwin Brown, in the offer and sale of a security to Betty B. Bailey, knowingly,

wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce, from Miami, Florida, to Salem, Virginia, a check in the amount of $464.01, to Betty B. Bailey, P. O. Box 849, Salem, Virginia, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 8

On or about December 9, 1975, in the District of Arizona, for the purpose of executing the scheme and artifice of Count 1 of this indictment and attempting to do so, Robert Edwin Brown, caused to be placed in an authorized depository for mail matter a letter addressed to R. or B. B. Bailey, Post Office Box 849, Salem, Virginia, to be sent or delivered by the Postal Service, all in violation of Title 18, United States Code, Section 1341.

COUNT 9

On or about September 10, 1971, in the District of Arizona, and the Southern District of Florida, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, Robert Edwin Brown, Lawrence Hollander and Richard LaPenta, in the offer and sale of a security to Mary E. Kohlhepp, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce from Miami, Florida, to Kingman, Arizona, a lot purchase agreement on Lot 207, Unit 20, Lake Mead Rancheros, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 10

On or about June 1, 1972, in the Southern District of Florida, and the District of Maryland, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, Robert Edwin Brown, in the offer and sale of a security to Mary E. Kohlhepp, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce from Miami, Florida, to Baltimore, Maryland, a check for $397.93, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 11

On or about July 28, 1971, in the District of Arizona and the Southern District of Florida, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, the defendants Robert Edwin Brown, Lawrence Hollander, and Richard LaPenta, in the offer and sale of a security to Margaret L. Trent, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce, from Miami, Florida, to Kingman, Arizona, a new contract transmittal sheet for Lot 2850, Unit 12, Lake Mead Rancheros, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 12

On or about September 15, 1971, in the Southern District of Florida, and the Northern District of Iowa, for the purpose of executing the pattern of conduct set out in Count 1

of this indictment, the defendant Robert Edwin Brown, in the offer and sale of a security to Margaret L. Trent, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce, from Miami, Florida, to Waterloo, Iowa, a check for $293.17 to Margaret L. Trent, 4185 W. 4th Street, Waterloo, Iowa, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 13

On or about July 7, 1971, in the Southern District of Florida, and the District of Arizona, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, the defendants, Robert Edwin Brown, Lawrence Hollander and Richard LaPenta, in the offer and sale of a security to Monty M. Cann, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce from Miami, Florida, to Kingman, Arizona, a lot purchase agreement, Lot 308, Unit 2, Lake Mead Rancheros, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 14

On or about October 1, 1972, in the Southern District of Florida, and the Eastern District of Virginia, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, the defendant, Robert Edwin Brown, in the offer and sale of a security to Monty M. Cann, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce

from Miami, Florida, to Portsmouth, Virginia, a check for $545.64, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 15

On or about July 7, 1971, in the District of Arizona, and the Southern District of Florida, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, the defendants Robert Edwin Brown, Lawrence Hollander and Richard LaPenta, in the offer and sale of a security to Arthur Bosley, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce from Miami, Florida, to Kingman, Arizona, a lot purchase agreement, Lot 346, Unit 2, Lake Mead Rancheros, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 16

On or about June 13, 1972, in the Southern District of Florida, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, the defendant Robert Edwin Brown, in the offer and sale of a security to Arthur Bosley, knowingly, wilfully, and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce from Miami, Florida, to Ft. Meyers, Florida, a check for $436.26, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 17

On or about September 12, 1972, in the Southern District of Florida, for the purpose of executing the pattern of

conduct set out in Count 1 of this indictment, the defendant Robert Edwin Brown, in the offer and sale of a security to Arthur Bosley, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce from Miami, Florida, to Ft. Meyers, Florida, a check for $90.18, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 18

On or about April 15, 1972, in the District of Arizona, the defendants Robert Edwin Brown, Lawrence Hollander and Richard LaPenta, knowingly, wilfully and unlawfully did, directly and indirectly, make use of the United States mails and did make use of means and instruments of transportation and communication in interstate commerce to sell a security, namely, an investment contract for Lot 47, Unit 6, New Tucson, of Corona de Tucson, Inc., with respect to which no registration statement was in effect with the Securities and Exchange Commission as required by law. Such use of the mails and interstate commerce being that the above security was caused to be sent from Tucson, Arizona, to Ft. Meyers, Florida, all in violation of Title 15, United States Code, Sections 77e(a) and 77x.

COUNT 19

On or about August 1, 1971, in the Southern District of Florida, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, the defendant Robert Edwin Brown, in the offer and sale of a security to Robert Prentice, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of inter-

state commerce from Miami, Florida, to Cocoa Beach, Florida, a check for $73.32 to Robert Prentice, 235 Jamaica Drive, Cocoa Beach, Florida, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 20

On or about January 1, 1972, in the Southern District of Florida, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, the defendant Robert Edwin Brown, in the offer and sale of a security to John C. Faircloth, knowingly, wilfully, and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce from Miami, Florida, to Atlantis, Florida, a check for $85.25 to John C. Faircloth, 405 S. County Club Drive, Atlantis, Florida, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 21

On or about July 14, 1971, in the District of Arizona, the Southern District of Florida and the Eastern District of Virginia, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, the defendants, Robert Edwin Brown, Lawrence Hollander and Richard LaPenta, in the offer and sale of a security to Charles and Eleanor Carroll, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and transport in interstate commerce by making use of a means of interstate commerce from Miami, Florida, to Kingman, Arizona, a lot purchase agreement, Lot 1054, Unit 5, Lake Mead Rancheros, and from Miami, Florida, to Norfolk, Virginia,

a lot purchase agreement, Lot 1054, Unit 5, and assignment thereof, all in violation of Title 15 United States Code, Sections 77q(a) and 77x.

COUNT 22

On or about May 16, 1972, in the Southern District of Florida, and the District of Maryland, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, the defendant Robert Edwin Brown, in the offer and sale of a security to Evelyn Barrett, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce from Miami, Florida, to Baltimore, Maryland, a check for $348.07 to Evelyn Barrett, 3104 Texas Avenue, Baltimore, Maryland, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 23

On or about September 27, 1971, in the District of Arizona and the Southern District of Florida, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, the defendants, Robert Edwin Brown, Lawrence Hollander and Richard LaPenta, in the offer and sale of a security to Gladys Engle, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce from Miami, Florida, to Kingman, Arizona, a lot purchase agreement, Lot 198, Unit 20, Lake Mead Rancheros, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 24

On or about April 10, 1972, in the District of Arizona, the defendants Robert E. Brown, Lawrence Hollander and Richard LaPenta, knowingly, wilfully and unlawfully did, directly and indirectly, make use of the United States mails and did make use of means and instruments of transportation and communication in interstate commerce to sell a security, namely, a promissory note and realty mortgage of Arizona-Florida Equities Corporation, Lot 2043, Unit 9, Lake Mead Rancheros, with respect to which no registration statement was in effect with the Securities and Exchange Commission as required by law. Such use of the mails and interstate commerce being that the above security was caused to be sent from Scottsdale, Arizona, to Englewood, Colorado, all in violation of Title 15, United States Code, Sections 77e(a) and 77x.

COUNT 25

On or about November 9, 1971, in the District of Arizona, the defendants Robert Edwin Brown, Lawrence Hollander and Richard LaPenta, knowingly, wilfully and unlawfully did, directly and indirectly, make use of the United States mails and did make use of means and instruments of transportation and communication in interstate commerce to sell a security, namely, an investment contract, with respect to which no registration statement was in effect with the Securities and Exchange Commission as required by law. Such use of the mails and interstate commerce being that an investment contract for Lot 377, Unit 2, Lake Mead Rancheros, and its associated assignment of contract were caused to be sent from Scottsdale, Arizona, to Englewood, Colorado, all in violation of Title 15, United States Code, Sections 77e(a) and 77x.

COUNT 26

On or about April 3, 1972, in the District of Arizona, the defendants Robert Edwin Brown, Lawrence Hollander and Richard LaPenta knowingly, wilfully, and unlawfully did, directly and indirectly, make use of the United States mails and did make use of means and instruments of transportation and communication in interstate commerce to sell a security, namely a promissory note, with respect to which no registration statement was in effect with the Securities and Exchange Commission, as required by law. Such use of the mails and interstate commerce being that a promissory note of Corona de Tucson, Inc., for $4,000.00, was caused to be sent from Scottsdale, Arizona, to Cheyenne, Wyoming, all in violation of Title 15, United States Code, Sections 77e(a) and 77x.

COUNT 27

On or about May 25, 1972, in the District of Arizona, the defendants Robert Edwin Brown, Lawrence Hollander and Richard LaPenta, knowingly, wilfully and unlawfully did, directly and indirectly, make use of the United States mails and did make use of means and instruments of transportation and communication in interstate commerce to sell a security, namely a promissory note, with respect to which no registration statement was in effect with the Securities and Exchange Commission, as required by law. Such use of the mails and interstate commerce being that a promissory note for $4,000.00 was caused to be sent from Scottsdale, Arizona, to Cedar Rapids, Iowa, all in violation of Title 15, United States Code, Sections 77e(a) and 77x.

COUNT 28

On or about November 22, 1971, in the District of Arizona, the defendants Robert Edwin Brown, Lawrence Hollander

and Richard LaPenta, knowingly, wilfully and unlawfully did, directly and indirectly, make use of the United States mails and did make use of means and instruments of transportation and communication in interstate commerce to sell a security, namely, a promissory note, with respect to which no registration statement was in effect with the Securities and Exchange Commission, as required by law. Such use of the mails and interstate commerce being that a promissory note for $2,500.00 for Corona de Tucson, Inc., was caused to be sent from Phoenix, Arizona, to Duluth, Minnesota, all in violation of Title 15, United States Code, Sections 77e(a) and 77x.

COUNT 29

On or about August 15, 1971, in the Southern District of Florida, for the purpose of executing the pattern of conduct set out in Count 1 of the indictment, the defendant Robert Edwin Brown, in the offer and sale of a security to Paul L. Chell, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce from Miami, Florida, to Satellite Beach, Florida, a check for $153.46 to Paul L. Chell, 453 Penguin Drive, Satellite Beach, Florida, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 30

On or about April 20, 1972, in the District of Arizona, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, the defendants Robert Edwin Brown, Lawrence Hollander and Richard LaPenta, in the offer and sale of a security to Arthur D. Bosley, knowingly, wilfully and unlawfully, directly and indirectly, did cause

to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce from Tucson, Arizona, to Miami, Florida, a lot purchase agreement, Lot 165, Unit 4, New Tucson, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 31

On or about April 20, 1976, in the District of Arizona, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, the defendants Robert Edwin Brown, Lawrence Hollander and Richard LaPenta, in the offer and sale of a security to Arthur D. Bosley, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce from Tucson, Arizona, to Miami, Florida, a lot purchase agreement, Lot 47, Unit 6, New Tucson, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 32

On or about April 8, 1974, in the District of Arizona, for the purpose of executing the pattern of conduct set out in Count 1 of the indictment, the defendants Robert Edwin Brown, Lawrence Hollander and Richard LaPenta, in the offer and sale of a security to Robert and Helen J. Risse, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce from Stewart Title & Trust, Tucson, Arizona, to Robert and Helen J. Risse of Tucson, Arizona, a check, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 33

On or about April 8, 1974, in the District of Arizona, for the purpose of executing the pattern of conduct set out in Count 1 of this indictment, the defendants, Robert Edwin Brown, Lawrence Hollander and Richard LaPenta, in the offer and sale of a security to William A. Janssen, knowingly, wilfully and unlawfully, directly and indirectly, did cause to be sent by mail and did transport in interstate commerce by making use of a means of interstate commerce from Stewart Title & Trust of Tucson, Tucson, Arizona, to William A. Janssen of Tucson, Arizona, a check, all in violation of Title 15, United States Code, Sections 77q(a) and 77x.

COUNT 34

Beginning on or about November, 1970, and continuing until July 7, 1976, Robert Edwin Brown, Lawrence Hollander and Richard LaPenta, as defendants, and Marjorie L. B. Cross, Phillip Swan and David Edstrom, as co-conspirators only and not as defendants, did combine, conspire, confederate and agree together and with each other to violate the following laws of the United States:

a. Title 18, United States Code, Section 1341, Mail Fraud.

b. Title 15, United States Code, Sections 77q(a) and 77x, Securities Fraud.

c. Title 15, United States Code, Sections 77e(a) and 77x, Sale of Unregistered Securities.

In furtherance thereof and to effect the objects of the conspiracy, the defendants performed those acts described in paragraphs one through eight of Count 1 of this indictment, and further specifically performed the following:

Overt Acts

1. On or about October 18, 1971, the defendants caused Robert J. Davis to send a $15,000.00 check payable to Arizona-Florida Development Corporation from Scottsdale, Arizona to Miami, Florida.

2. On or about November 3, 1971, in Phoenix, Arizona, Robert E. Brown endorsed a check for $1989.90 made payable to Arizona-Florida Development Corporation.

3. On or about December 1, 1971, Robert Edwin Brown hired Sanford Loff as an accountant for Arizona-Florida Development Corporation in Miami, Florida.

4. On or about June 21, 1972, Robert E. Brown obtained the services of Arizona Title Insurance and Trust Company to handle the Lake Mead Rancheros development for Arizona-Florida Development Corporation, while in Arizona.

5. On or about August 1973, Robert E. Brown moved the offices of the corporations listed in 3(a) of Count 1 to Houghton Road, Tucson, Arizona, all in violation of Title 18, United States Code, Section 371.

A TRUE BILL
/s/ CRISPI D. RICHARD
Foreman

WILLIAM C. SMITHERMAN
United States Attorney
/s/ BRUCE HEURLIN
Assistant United States Attorney

APPENDIX II

Judgment and Commitment Order

[Filed March 15, 1977]

United States District Court
for the District of Arizona

No. CR-76-356-TUC

UNITED STATES OF AMERICA

v.

ROBERT EDWIN BROWN

Finding & Judgment

Defendant has been convicted as charged of the offense(s) of violating Title 15, United States Code, Section 77q(a), fraud in the sale of securities, as charged in Counts II, IV, VI, VII, IX, X, XII, XIV, XIX and XX, and Title 18 United States Code, Section 371, conspiracy, as charged in Count XXXIV of the Indictment filed herein.

Sentence

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on Count II of Indictment and shall pay a fine in the sum of Five Thousand Dollars ($5,000.00) to the United States. It is ordered that the defendant is to stand committed until the fine is paid or otherwise discharged by due course of law.

It is the further judgment and sentence of the court on each of Counts VI, VII, X and XIV that the defendant be committed to the custody of the Attorney General for imprisonment for a period of five (5) years, the sentences imposed on these counts to be served concurrently with the sentence imposed on Count II and concurrently with each other.

It is the further judgment and sentence of the court on each of Counts IV, IX, XII, XIX, XX and XXXIV that the defendant pay a fine in the sum of Five Thousand Dollars ($5,000.00) to the United States.

Order execution of sentence stayed for 48 hours to enable defendant to give notice of appeal and to furnish bond on appeal.

/s/ JAMES A. WALSH
James A. Walsh

APPENDIX III

Judgment

[Filed June 1, 1978]

United States Court of Appeals
for the Ninth Circuit

No. 77-1742

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT EDWIN BROWN,
Defendant-Appellant.

APPEAL from the United States District Court for the District of Arizona.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Affirmed.

A True Copy
Attest Jun 1, 1978
EMIL E. MELFI, JR.
Clerk of Court
By: /s/ PAT NAMEKAWA,
Pat Namekawa
Deputy Clerk

APPENDIX IV

Opinion

[Filed June 1, 1978]

United States Court of Appeals
for the Ninth Circuit

No. 77-1742

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT EDWIN BROWN,
Defendant-Appellant.

Before: Wright and Hug, Circuit Judges, and Ingram*, District Judge

INGRAM, District Judge:

Robert Edwin Brown appeals from his conviction after trial by court of 10 counts of violations of 15 U.S.C. § 77q(a) (counts 2, 4, 6, 7, 9, 10, 12, 14, 19, and 20 for securities fraud) and one conspiracy count in violation of 18 U.S.C. § 371 (count 34).

On appeal Brown contends that five counts upon which he was convicted (counts 2, 4, 12, 19, and 20) are barred by the Statute of Limitations and that the trial court erred in denying his motion for judgment of acquittal with respect to those counts; that four counts (counts 7, 9, 19, and 20) were not supported by evidence sufficiently substantial to support a finding of guilt beyond a reasonable doubt; that the evidence produced by the government was insufficient to support a finding of the existence of a specific intent to sell a security or knowledge on the part of the defendant that the instruments in question were

*Honorable William A. Ingram, United States District Judge, Of the Northern District of California, sitting by designation.

securities;[1] that the evidence adduced in support of count 10 was materially at variance with the allegations of the indictment and that the court erred in denying the motion for judgment of acquittal made upon that ground; that the court erred in denying defendant's motion for dismissal on the ground of pre-indictment delay; and, finally, that the evidence was insufficient to support the conviction of the conspiracy charge embraced within the allegations of count 34.

We disagree with each of the contentions set forth by appellant.

I.

FACTS

We review the facts in their aspect which is most favorable to the government. *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Mosco v. United States,* 301 F.2d 180 (9th Cir. 1962); *Castro v. United States,* 323 F.2d 683 (9th Cir. 1963).

Appellant was president of a corporation, Buckeye Mines, Inc., which had subsidiaries including Arizona-Florida Equities Corp., Arizona-Florida Development Corp., and Corona De Tucson. Appellant was president of the latter two subsidiaries.

Arizona-Florida Development Corp. (AFD) was formed in 1970 for the purpose of developing land. To develop sufficient cash flow to accomplish that purpose, land con-

1. At oral argument, appellant urged that the court erred as a matter of law in its expression that proof of knowledge of the identity of the instruments as securities was unnecessary and that the government sufficiently carried its burden of proof of specific intent to defraud. Hence, effectively the substantiality of the evidence argument as reflected in the briefs was abandoned on appeal.

tracts purportedly sold to purchasers were factored through a Florida company, Summit Investment Co., with appellant receiving from Summit a sum equal to 80 percent of their face value. The contracts factored through Summit were sold to investors through brokers, with the result that appellant became obligated to the investors for the monthly payments provided in the contracts.

Many of the land contracts transferred in the fashion described were forged. Payments were made to purchasers of these forged instruments as if they were genuine. In other cases, purchasers were given a six month cancellation privilege. These contracts were also factored in the fashion described prior to the expiration of the six month period. In still other instances, salesmen employed by appellant and AFD were encouraged to enter into land purchase agreements which did not require them to make payments. Contracts of this category were also sold to investors. Some investors received their monthly payment checks although the contracts they had purchased had been cancelled.

After October, 1971, during which month the Securities and Exchange Commission ordered Summit to cease selling contract assignments, the sale of these ceased. Thereafter, appellant commenced selling contract assignments and promissory notes and mortgages in a development known as Corona. Under this plan, an investor received a promissory note secured by a mortgage on a lot in a development known as Lake Mead. In August, 1973, appellant's companies defaulted on their obligations and were indebted to investors in a sum exceeding six million dollars.

Appellant received a sentence of five years and a $5,000 fine on count 2, a sentence of five years on four additional

counts to run concurrently with count 2 and with each other, and a $5,000 fine on each of the six remaining counts.

Appellant is presently out of custody on bail.

II.

REQUIREMENT OF SPECIFIC KNOWLEDGE THAT THE INSTRUMENTS WERE SECURITIES

In attacking his conviction of the alleged violations of 15 U.S.C. § 77q, appellant principally contends that the government's burden includes the obligation to prove beyond a reasonable doubt that appellant knew that the items sold were securities within the meaning of the act. Appellant argues that the use of the word "willful" in 15 U.S.C. § 77x, the penalty provision for violations of § 77q, imports the requirement of specific knowledge of the identity of instruments as securities.[2] We are therefore required in determining this issue to construe the word "willfully" as it appears in the context of this statute. We are mindful that "willful" and "willfully" are words of many meanings, and that their construction is often influenced by context. *Screws v. United States,* 325 U.S. 91, 101, 65 S.Ct. 1031, 1035, 89 L.Ed. 418, 422 (1945); *Spies v. United States,* 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 (1943).

Appellant, relying upon *United States v. Lizarraga-Lizarraga,* 541 F.2d 826 (9th Cir. 1976), and *United States v. Klee,* 494 F.2d 394 (9th Cir. 1974), argues that the court

2. 15 U.S.C. § 77x: "Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both." [May 27, 1933, c. 38, Title I, § 24, 48 Stat. 87.]

erred as a matter of law in entering judgments of conviction upon the counts alleging violations of 15 U.S.C. § 77q in that the court did not require proof of specific intent to sell a security, or proof of specific knowledge on the part of appellant that the instruments sold were securities within the meaning of the Securities Act of 1933. Appellant contends that the word "willfully" as used in § 77x requires this proof in order to convict.

Lizarraga-Lizarraga finds that Congress intended the requirement of proof of specific intent by its use of the word "willful" in enacting 22 U.S.C. § 1934, which proscribes the exportation of such contraband articles as may be defined by regulation promulgated thereunder. Within the context of that statute, the court found that, absent proof of specific intent, prosecutions and convictions might ensue because of the unwitting and innocent exportation of innocuous articles that were in fact contraband because the regulations so defined them. Reference to the statute alone, without the regulations at hand, would not enlighten the unwary, and the Congressional intent was inferred from that circumstance. In *Klee,* an income tax "failure to file" case, the court approved the giving of an instruction which required proof of a knowing violation of law, as distinguished from innocent error or inadvertence, or even from reckless disregard. In sum, these cases find a requirement of the necessity of proof of specific intent in the use of the term "willful" as a necessary inference of Congressional intent to avoid the prosecution of the innocent, feckless or reckless.

In contrast, 15 U.S.C. § 77q in substance proscribes the offer or sale of a security through the use of instruments or communications in commerce or by the use of the mails where the offer or sale involves:

1) The employment of a device or scheme to defraud, or

2) The obtaining of money or property through untrue statements of material facts or the omission to state material facts, the omission of which makes statements made misleading, or
3) Conduct amounting to fraud and deceit.

This prohibition of conduct is not a trap for the unwary because the thrust of it is fraud. Our question is whether the government is required to prove that one otherwise transgressing this statute must specifically know that the vehicle of his perfidy is a security within the meaning of the Securities Act.

We think that the government is required to prove specific intent only as it relates to the action constituting the fraudulent, misleading or deceitful conduct, but not as to the knowledge that the instrument used is a security under the Securities Act. The government need only prove that the object sold or offered is, in fact, a security; it need not be proved that the defendant had specific knowledge that the object sold or offered was a security.

In *United States v. Riedel,* 126 F.2d 81 (7th Cir. 1942), a prosecution for six counts of violations of 15 U.S.C. § 77q, 77x, and three counts of mail fraud, defendant contended that the instruments in question (trust certificates) were not securities within the meaning of the Securities Act of 1933 as amended. The court held that the question of whether or not the instrument in issue was a security was determinable from the evidence, and that where the issuance of such instruments was a part of a fraud practiced upon a purchaser, a violation of the Securities Act occurred. While the question of specific knowledge of the nature of the instruments as securities was neither raised by the parties nor addressed by the court, it is implicit in the holding that where inclusion of the instrument in question in the definition of a security in the context of a fraud case is itself a jural fact, the knowledge and belief of the defendant with respect to this is not a relevant fact requiring proof.

There is, of course, no issue in the case before us as to whether the instruments factored and assigned by appellant were securities. They are conceded to be.

In marked contrast to such holdings as *Lizarraga-Lizarraga* and *Klee,* it is interesting to note that when considering the securities acts, an eminent court has held that one may violate the rule of the Securities Exchange Commission without knowing of the existence of such rule. Judge Friendly, in *United States v. Pletz,* 433 F.2d 48 (2nd Cir. 1970), reached this conclusion in construing the provisions of § 32a of the Securities Exchange Act of 1934. In his consideration of the terms "willfully" and "willfully and knowingly" within the context of that section he writes:

> "The language makes one point entirely clear. A person can willfully violate an SEC rule even if he does not know of its existence. This conclusion follows from the difference between the standard for the violation of the statute or a rule or regulation, to wit, 'willfully', and that for false and misleading statements, namely 'willfully and knowingly' . . ." (433 F.2d at 54.)

15 U.S.C. § 77x uses the term "willfully" rather than the term "willfully and knowingly."

A panel of the same court in *United States v. Schwartz,* 464 F.2d 499 (2nd Cir. 1972) construing § 32a of the Securities Exchange Act of 1934 and 15 U.S.C. § 78a, concluded that:

> "Proof of a specific intent to violate the law is not necessary to uphold a conviction under § 32a of the Act, provided that satisfactory proof is established

that the defendant intended to commit the act prohibited. This conclusion is in harmony with the rationale in several decisions, which have considered the kind of intent necessary to sustain a criminal conviction or the imposition of a civil penalty for that class of violations designated as 'public welfare offenses'." (464 F.2d at 509.)

It is true that the use of the word "willful" in the context of § 32a is easier to determine than it is in § 77x because the former section only permits the imposition of a fine, and not imprisonment where it is shown that the actor was not aware of the statute, rule or regulation violated. However, we are satisfied that the use of the word "willful" as employed in 15 U.S.C. § 77x does not import a requirement of specific knowledge that an instrument is a security as defined in the Act.

III.

STATUTE OF LIMITATIONS (COUNTS 2, 4, 12, 19, AND 20)

The parties are in agreement that the applicable statute of limitations is contained in 18 U.S.C. § 3282, which is a five year period of limitations commencing to run from the time of the commission of the offense. Appellant construes the operative act prohibited by 15 U.S.C. § 77q(a), upon which the application of the statute depends, as "the offer or sale of any securities", and contends that the crime is completed when the sale is completed. Appellee would compute the running of the statute in this case from the mailing of the last purported monthly payment to the investor-purchasers of the land contracts in question.

Appellant, relying on *Carroll v. United States,* 326 F.2d 72 (9th Cir. 1963), contends that the sales in issue, which

were evidenced by the transmission of written assignments of land purchase contracts to Summit, the Florida factors, and Summit's receipt of payments from individual investors in return for the assignments, took place more than five years before the return of the indictment on July 7, 1976. Appellant contends that the subsequent use of the mails by him to transmit purported monthly payments to individual investors was not a part of the "offer or sale" and that such mailings cannot constitute the starting point for the computation of the period of limitations. In *Carroll,* the mailing involved was of stock certificates evidencing the ownership of stock previously offered, accepted and paid for. There the court agreed with the appellant therein that the mailings in question satisfied the jurisdictional requirement, but did not go to the essence of the "offer or sale" proscribed by the Securities Act, and were only incidental to it. The court concluded that the completed sales transactions occurred outside the time limited by the statute and that the charging allegations based thereon were barred.

Appellee urges that in the circumstances of this case, the time should be computed from the time of the mailing of payment checks to individual investors who purchased the instruments in question from Summit. Appellee distinguishes the *Carroll* case on the basis that there the fraud had essentially been completed before the mailings there in question occurred. Appellee contends that the mailings in the instant case were in furtherance of the fraudulent scheme and a part of a continuing fraud, and that the mailings served the purpose of lulling the recipients of the mailings into a state of passive inactivity, thus perpetuating the fraudulent scheme. Secondarily, appellee

distinguishes *Carroll* on the basis that the assignments to the individual investors could not become effective until executed and that the execution thereof is, therefore, an integral part of the "offer or sale" and occurred within the period limited by the statute.

We think that the facts of this case do not fall within the holding of *Carroll*. The mailings of purported monthly payments to the purchasers of the land contracts, in our view, constitute an integral part of the transaction which the court found to be fraudulent. In analogous prosecutions under the mail fraud statute (18 U.S.C. § 1341) activities tending to lull investors, either to prevent discovery of fraud or to permit further fraudulent activities to progress unhindered, have been held to constitute a part of the execution of the fraudulent scheme and to be integral to the offense rather than incidential [*sic*] to it. *United States v. Ashdown,* 509 F.2d 793 (5th Cir. 1975); *United States v. Sampson,* 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed2d 136 (1962). The record before us is ample to support a like conclusion.

IV.

SUBSTANTIALITY OF THE EVIDENCE ON ISSUE OF SPECIFIC INTENT — (COUNTS 7, 9, 19, AND 20)

Appellant contends that the evidence in support of the named counts is not sufficiently substantial to prove specific intent to defraud beyond a reasonable doubt. He relies on the testimony of Smyler, a witness produced by the government (RT 161-230) to support his contentions as to counts 6 and 9, to the effect that the face of the contracts in issue did not reveal their invalidity, and that the facts showing invalidity could not have been apparent to appellant until the contracts had already been assigned by him. (RT 205 p. 22-206 ln. 6.) [*sic*]

Appellee, after correctly adverting to our obligation to view the evidence in a light most favorable to the government, contends that prior to the execution and assignment of the contracts, which are involved in counts 6 and 9, the evidence amply shows appellant's knowledge of the insubstantiality of and the probability of cancellation of contracts assigned to investors.

The trier of fact is entitled to regard the evidence as a whole and to consider all the surrounding relevant circumstances in evaluating the presence or absence of specific intent. *Benchwick v. United States,* 297 F.2d 330 (9th Cir. 1961). The record contains evidence sufficiently substantial to support the conclusion of the trial judge.

As to counts 19 and 20, appellant relies on the testimony of assignees Prentice and Faircloth to the effect that they did not believe themselves to have been defrauded. This testimony, while it may be relevant to the state of mind of the witness involved, can hardly be probative on the issue of appellant's intent.

V.

VARIANCE

Appellant urges that the allegation contained in count 10, that appellant caused to be mailed to an investor a check in the sum of $397.93, is at variance with the proof relied upon to support the allegation. The evidence revealed and the Bill of Particulars specified that the check received by the investor in question was in the sum of $514.23.

This apparent discrepancy is explained adequately by the investor's testimony that she had two separate investments with appellant's corporation, and that, since both of her investments were paid by means of one check, a portion

of this $514.23 check did constitute a payment of the $397.93. In any event, there is no showing of prejudice.

VI.

PRE-INDICTMENT DELAY

Appellant cites as error the trial court's ruling denying his motion to dismiss for pre-indictment delay. In order to prevail on such a motion, appellant must demonstrate actual prejudice. *United States v. Mays,* 549 F.2d 670, 677 (9th Cir. 1977). He has not done so.

VII.

INSUFFICIENCY OF EVIDENCE TO SUPPORT CONSPIRACY COUNT (COUNT 34)

Appellant challenges the sufficiency of the evidence to support his conviction for conspiracy on count 34 of the indictment. As noted previously, appellant's land contract assignments were first marketed through Summit Investment Company, but Summit was forced to cease selling the contract assignments pursuant to an SEC order. To continue financing his scheme, appellant contacted one Robert Davis, who thereafter provided a new source of revenue for appellant. In light of this subsequent arrangement, appellant alleges that, at best, the evidence shows two conspiracies, with appellant being a common factor in each; that the case thus comes within the ambit of *Kotteakos v. United States,* 328 U.S. 750 (1946) and that the proof of two conspiracies where only one is alleged is prejudicial.

Appellee counters with the contention that Davis was a new source of revenue who was utilized in the consummation of the on-going conspiracy by furnishing money with which to pay off old investors.

The trial court was justified in finding one on-going conspiracy. The testimony of Davis and that of LaPenta with respect to sales and on-going payment of investors substantially justified the conclusion of the court.

The judgments are affirmed. Let mandate issue and bail be revoked forthwith.

APPENDIX V

Order Denying Recall of Mandate

[Filed June 16, 1978]

United States Court of Appeals
for the Ninth Circuit

No. 77-1742

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT EDWIN BROWN,
Defendant-Appellant.

Before: Wright and Hug, Circuit Judges

Defendant's Petition for Recall of Mandate has been considered and is denied.

APPENDIX VI

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

June 23, 1978

Jack E. Brown, Esquire
222 North Central Avenue
Phoenix, Arizona 85004

Re: Robert Edwin Brown v. United States
A-1074

Dear Mr. Brown:

Your application for stay in the above-entitled case has been presented to Mr. Justice Rehnquist, who has endorsed thereon the following:

"Denied
6/22/78
WHR"

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ FRANCIS J. LORSON
Francis J. Lorson
Deputy Clerk

th

cc: Hon. Wade H. McCree, Jr.
Solicitor General of the United States

APPENDIX VII

Order

[Filed July 24, 1978]

United States Court of Appeals
for the Ninth Circuit

No. 77-1742

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT EDWIN BROWN,
Defendant-Appellant.

Before: Wright and Hug, Circuit Judges, and Ingram, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. The circuit judges have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

No. 78-307

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT EDWIN BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-307

ROBERT EDWIN BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 29a-41a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1978. A petition for rehearing was denied on July 24, 1978. The petition for a writ of certiorari was filed on August 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's ruling that land sales contracts sold to investors were "securities" constituted a retroactive application of the law.

2. Whether it was necessary for the government to prove that petitioner was aware that land sales contracts were securities to establish that he engaged in a willful securities fraud in violation of 15 U.S.C. 77q(a) and 77x.

STATEMENT

Following a bench trial in the United States District Court for the District of Arizona, petitioner was convicted on 10 counts of securities fraud, in violation of 15 U.S.C. 77q(a) and 77x, and one count of conspiracy to engage in securities fraud, in violation of 18 U.S.C. 371.[1] He was sentenced to five concurrent terms of five years' imprisonment and fined $35,000.

The evidence demonstrated that petitioner was the president of Buckeye Mines, Inc., a holding company, and its subsidiaries, Arizona-Florida Development Corp. (AFDC) and Corona de Tuscon (Corona) (R. 753-754). These firms were engaged in the development of real estate located in Arizona and Florida (R. 485; Pet. App. 30a-31a).

Purchasers of real estate would make initial down payments and agree to pay the balance on a monthly basis over a 36 or 60-month period (R. 234, 237, 317). To obtain cash on a rapid basis, AFDC assigned its rights under these contracts. Summit Investment Co., a factor, purchased the contracts for 80% of face value and, in turn, marketed them to individual investors (R. 311, 313, 498). AFDC remained obligated to the investors as a guarantor of the monthly payments of the real estate purchasers (Pet. App. 31a).

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[1]Petitioner was convicted on counts 2, 4, 6, 7, 9, 10, 12, 14, 19, and 20 of the indictment. See Pet. App. 1a-25a, 26a.

Instead of contracts entered into by actual purchasers, however, petitioner assigned forged contracts bearing fictitious names (R. 780), names of buyers who had cancelled and were not obligated to make payment (R. 234), and names of AFDC salesmen who were under no obligation to make payment (R. 181). In an attempt to conceal the fictitious nature of these contracts, petitioner paid certain sums of money to the investors who had bought the contracts (R. 771-773). In August 1973, however, the payments ceased and petitioner's companies defaulted on their obligations. At that time, they were indebted to public investors in an amount exceeding six million dollars (Pet. App. 31a).

1. Petitioner contends (Pet. 6-9) that due process was denied when the trial court determined that the land sale contracts were "securities." Petitioner asserts that this was a retroactive application of the law, and that he had "no fair warning" prior to that time that the obligations that he sold to investors could be deemed "securities."

Because this issue was not raised in or decided by the courts below, it is not properly presented here. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner's claim of retroactivity is groundless. Petitioner now concedes that "the contracts are subject to the Act" (Pet. 7, n. *). Public investors purchased investment contracts that were sold by petitioner's companies and underwritten by Summit. They were induced to give money to a common business enterprise with the expectation of profit deriving solely from the managerial efforts of others. Such investment contracts fall squarely within the statutory definition of a security. That principle was established long ago, and no retroactive application of the law is involved. See *SEC* v.

W.J. Howey Co., 328 U.S. 293, 298-299 (1946) ("land sales contract"); *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351-353 (1943) ("interest in real estate").[2] See also *Los Angeles Trust Deed & Mortgage Exchange* v. *SEC*, 285 F. 2d 162, 166-167 (9th Cir. 1960), cert. denied, 366 U.S. 919 (1961); *SEC* v. *Lake Havasu Estates*, 340 F. Supp. 1318, 1321-1323 (D. Minn. 1972).[3]

Marks v. *United States*, 430 U.S. 188, 191-196 (1977), has no relevance here. *Marks* held that it was improper to apply a new definition of obscenity retroactively where the defendant's conduct would not have been punishable under the definition applicable at the time of the alleged offense. In such a case, the defendant had "no fair warning" of potential criminal liability. Here, in contrast, the courts below applied a previously existing legal standard to petitioner's conduct, and no question of unfairness arises.

2. Petitioner also argues (Pet. 9-12) that he cannot be convicted in the absence of proof that he knew or should have known that the investment contracts that he sold were "securities" giving rise to jurisdiction under the federal securities laws, 15 U.S.C. 77x.

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[2]Of course, where interests in real estate are sold to persons intending to occupy the real estate themselves, a security sale is not involved. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, (1975); 1 L. *Loss, Securities Regulation* 493 (2d ed. 1961). But that principle is inapplicable here because the contracts in question were sold to investors.

[3]This case has no relationship to *International Brotherhood of Teamsters* v. *Daniel*, Nos. 77-753, 77-754 (cert. granted Feb. 21, 1978). *Daniel* is a civil action under Rule 10b-5, raising the issue whether employee interests in involuntary-noncontributory pension plans constitute securities.

But petitioner had every reason to know that his conduct could be punished under federal law, as the foregoing cases establish. Moreover, petitioner's fraud was obviously a violation of state law, and his ignorance of the basis for federal jurisdiction is simply no defense: "The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum." *United States* v. *Feola*, 420 U.S. 671, 685 (1975). This general rule has long prevailed under the Securities Act of 1933. See *Tager* v. *SEC*, 344 F. 2d 5, 8 (2d Cir. 1965): "It has been uniformly held that 'willfully' in this context means intentionally committing the act which constitutes the violation. There is no requirement that the actor also be aware that he is violating one of the Rules or Acts." See also *United States* v. *Brashier*, 548 F. 2d 1315, 1328 (9th Cir. 1976); *United States* v. *Benjamin*, 328 F. 2d 854, 862-863 (2d Cir. 1964).

United States v. *Critzer*, 498 F. 2d 1160, 1162 (4th Cir. 1974), and *United States* v. *Lizarraga-Lizarraga* 541 F. 2d 826, 828-829 (9th Cir. 1976), do not conflict with the decision below. Neither case dealt with the *mens rea* requirement of 15 U.S.C. 77x. *Critzer* interpreted the *mens rea* requirement of the Internal Revenue Code, concluding that the defendant did not act with a culpable state of mind where the Department of the Interior had advised her to act as she did and where "co-ordinate branches of the United States Government plausibly reach[ed] directly opposing conclusions." *Lizarraga* held that a prosecution under the National Security Act of 1954 required proof that the defendant had specific knowledge that particular merchandise could not be exported, because the merchandise was not contraband and "might be exported or imported innocently." In the present case,

in contrast, petitioner had no reasonable ground to conclude that his conduct was beyond the scope of federal law and could not have regarded his fraudulent scheme as "innocent."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JEROME M. FEIT
BARRY FRIEDMAN
Attorneys

OCTOBER 1978

DOJ-1978-10

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-307

ROBERT EDWIN BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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OCTOBER TERM, 1978

No. 78-307

ROBERT EDWIN BROWN,
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v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

THE GOVERNMENT MISREPRESENTS PETITIONER'S ARGUMENT THAT RETROACTIVE APPLICATION OF JUDICIAL INTERPRETATIONS HOLDING LAND SALE CONTRACTS TO CONSTITUTE SECURITIES VIOLATED PETITIONER'S DUE PROCESS RIGHTS AND FAILS TO DEMONSTRATE WHY THIS COURT IS PRECLUDED FROM HEARING THE IMPORTANT CONSTITUTIONAL ISSUE WHICH PETITIONER PRESENTS.

The Government erroneously characterizes Petitioner's due process argument as claiming that "due process was denied when the trial court determined that the land sale contracts [for which sale Petitioner was convicted] were 'securities.'" [Brief in Opp. 3] Petitioner, however, was denied due process not when the trial court determined that the land sale contracts forming the basis of his indictment were securities, but when that court applied its determination retroactively to convict Petitioner of acts which occurred prior to a decision by any court of the United States that land sale contracts constituted securities. While the Government is correct in asserting that the principle that an investment contract constitutes a security was established by the Court in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), it flagrantly mischaracterizes *Howey* as definitively holding land sale contracts to be securities. To the contrary, the Court specifically stated that "[t]he legal issue in this case turns upon a determination of whether, under the circumstances, the land sales contract, the warranty deed and the service contract *together* constitutes an 'investment contract' within the meaning of § 2(1)." 328 U.S. at 297 (emphasis supplied). The Court clearly did not address the question of whether a land sale contract, without more, constituted a security. It was not until 1972, after the acts for which Petitioner was convicted had occurred, that any court held land sale contracts to be securities. *SEC v. Lake Havasu Estates*, 340 F. Supp. 1318 (D. Minn. 1972). Indeed, as late as 1975, the Tenth Circuit in *McCown v. Heidler*, 527 F.2d 204, 208 (10th Cir. 1975), stated that "a land purchase contract ... does not fall automatically within the

confines of the Securities Acts."[1] By retroactively applying post-conduct judicial decisions in order to sustain Petitioner's conviction, the Ninth Circuit violated Petitioner's due process rights just as clearly as did the Sixth Circuit in *Marks v. United States*, 430 U.S. 188 (1977), when that court retroactively applied a definition of obscenity which differed from that established by judicial decisions at the time of the defendants' conduct.[1]

The Court's review of Petitioner's due process contention is particularly important in view of the pendency before the Court of a closely related issue in *International Brotherhood of Teamsters v. Daniel*, 561 F.2d 1223 (7th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3526 (U.S. Feb. 21, 1978) (Nos. 77-753 and 77-754): Whether the Court's determination of the status of non-contributory pension plans as securities should be given retroactive application. *See* Appendix attached hereto. While the Court's determination of the issue of retroactivity in *Daniel* will determine only the right of a plantiff to monetary relief, the decision will have criminal ramifications far beyond the narrow civil context in which it will be rendered. Petitioner's case directly poses the question of the extent to which a judicial determination with respect to the status of a

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[1] The Government's citation of SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943) (sale of assignments of oil leases), and Los Angeles Trust Deed & Mortgage Exchange v. SEC, 285 F.2d 162 (9th Cir. 1960), *cert. denied*, 366 U.S. 919 (1961) (sale of promissory notes secured by a mortgage on real property), are equally misleading. Neither decision considered whether land sale contracts were "securities."

"security" may constitutionally be given retroactive application and, therefore, should be considered by the Court.

Contrary to the Government's conclusory argument that Petitioner has not properly presented the issue of due process, Petitioner squarely presented the issue of his lack of knowledge, and hence lack of notice, before both the trial and appellate courts. [RT 1064; App. 32a] His failure to "specifically urge" the courts below to consider whether his due process rights were violated by retroactive application of judicial determinations that land sale contracts were "securities" should not, in the interest of fundamental justice, preclude this Court's consideration of his constitutional claim.[2]

---

[2] The Court in Hormel v. Helvering, 312 U.S. 552 (1941), established that technical procedural infirmities should not be used to preclude appellate consideration of important issues of which all parties were apprised during the course of litigation. Significantly, it said:

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Id. at 557. The purpose for precluding consideration of issues on appeal which were not presented to courts below is to assure that "litigants . . . not be surprised on appeal by final decision of issues upon which they have had no opportunity to introduce evidence." *Id.* at 556. Here, however, the general procedural rule cited by the Government clearly has no application.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: October 23, 1978.

Appendix follows

APPENDIX

Nos. 77-753 and 77-754

In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

JOHN DANIEL

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and LOUIS F. PEICK, PETITIONERS

v.

JOHN DANIEL

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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2. *Prospective application.*

In the event that this Court determines that employee interests in involuntary, non-contributory pension plans are protected by Section 10(b), 15 U.S.C. 78j(b), and Rule 10b-5, any liability should be imposed only prospectively, for the reasons recently stated by this Court in *City of Los Angeles, Department of Water and Power* v. *Manhart*, No. 76-1810, decided April 25, 1978. In *Manhart*, the Court recognized that (slip op. 18):

> The occurrence of major unforeseen contingencies * * * jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.

We have argued in point I of this brief that Congress has not authorized a cause of action under the Securities Acts in the circumstances of this case. While that conclusion is subject to argument, we see no basis for arguing that Congress has "plainly commanded" retroactive liability in these circumstances under the Securities Acts. Any finding of liability would be a "marked departure from past practice," resulting in "devastating" liability which would be borne "in large part [by] innocent third parties" (*id.* at 19). We recognize that a damage remedy under the anti-fraud provisions, like the award of backpay at issue in

Manhart, should ordinarily not be withheld. Because of the peculiar problems of retroactive liability in the pension plan context, however, here as in *Manhart* liability, if imposed at all, should be entirely prospective, making actionable under the securities laws only those misrepresentations that occur after the announcement of this Court's decision.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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